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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1944.

THE WALLACE CORPORATION,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD.

No. 66.

PETITION FOR REHEARING.

R. WALSTON CHUBB,
Counsel for Petitioner.

LEWIS, RICE, TUCKER, ALLEN & CHUBB,
Of Counsel.

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PETITION FOR REHEARING.

To the Honorable the Justices of the Supreme Court of the United States:

Comes now The Wallace Corporation, petitioner in the above-entitled cause, and presents this its petition for a rehearing of said cause and in support thereof respectfully shows:

I. The Court in its majority opinion has dismissed as a procedural technicality the petitioner's principal defense, namely, the valid and binding settlement contract signed by the parties in settlement of the strike, which

settlement was approved by the Board with full knowledge of the circumstances and was thereafter fully executed by the parties. This settlement required the company to make the closed shop contract for which it is now penalized.

II. The Court omits mention of and, as it may be assumed, has overlooked the controlling circumstance that the Board had full knowledge of all the material facts affecting the strike settlement, having made a statutory investigation of the same charges now advanced to invalidate this settlement. The petitioner was entirely justified in relying upon a settlement so openly approved.

III. The court has approved administrative repudiation of a settlement contract without precedent therefor, either in the policy of the Board, or the decisions of the courts.

First, the authorities which the court cites do not support repudiation of contracts. Second, the Court has discarded without due consideration the fair, practical and well recognized doctrines of estoppel, and has erroneously characterized these doctrines as technical judicial concepts affecting administrative procedure only, and irrelevant to this case.

IV. Through no fault of petitioner, and upon technical grounds, the court has denied argument on the facts with respect to the propriety of the heavy penalties imposed in this case.

V. The majority opinion contains findings of fact which enlarge upon the findings of the Board and are not supported by the record.

Petitioner submits herewith suggestions in support of this petition, setting forth citations of the record and of the authorities in elaboration of the foregoing.

Wherefore, upon the foregoing grounds, it is respectfully urged that this petition for rehearing be granted and that the judgment of the Circuit Court of Appeals for the Fourth Circuit be, upon further consideration, reversed.

Respectfully submitted,

R. WALSTON CHUBB,
Counsel for Petitioner.

LEWIS, RICE, TUCKER, ALLEN & CHUBB,
Of Counsel.

Certificate of Counsel.

R. Walston Chubb, counsel for the above-named petitioner, hereby certifies that the foregoing petition for rehearing is presented in good faith and not for delay.

January 8, 1945.

R. Walston Chubb,
Counsel for The Wallace Corporation.

SUGGESTIONS IN SUPPORT OF PETITION FOR REHEARING.

In support of the motion for rehearing above set forth, petitioner respectfully submits the following suggestions:

I.

The Court in its majority opinion has dismissed as a procedural technicality the petitioner's principal defense, namely, the valid and binding settlement contract signed by the parties in settlement of the strike, which settlement was approved by the Board with full knowledge of the circumstances and was thereafter fully executed by the parties. This settlement required the Company to make the closed shop contract for which it is now penalized.

The court briefly discusses this defense as a procedural matter, as though it were asserted only as an objection to evidence. On the contrary, this was the defense upon which the petitioner relied throughout, both in its answer (R. 43-47) and motion to dismiss (R. 47-52) and in the trial of the case. Petitioner entered into the settlement and performed it on the assumption that the CIO voluntarily waived any claim of domination, that the Board (which had previously investigated the question as hereinafter more fully set forth) had approved withdrawal of the charges, and, in brief, that the issue was dead by unanimous agreement. Petitioner had never formally recognized the Independent and assumed that it was now recognized by the Board and placed on the ballot, for the very proper purpose, unanimously shared, of ending the CIO strike and getting the people back to work.

The court has thus overlooked the contractual nature of the settlement. The settlement was a contract of the parties, not an administrative act of the Board. It is common enough procedure for the Board to dismiss charges

upon a stipulation of the employer with the Board that he will no longer offend. (See Point III, infra.) Such an agreement is not contractual and is naturally good only during good behavior. On the other hand, a formal settlement contract between two contending unions and an employer settling a strike and calling for an election and arbitration of other matters in dispute, is quite a different matter. It is intended to bind the parties. They expect to change position on the faith of it; and they did in this case. An executed arbitration fully performed cannot be repudiated by the loser. Ordinarily and upon familiar principles, unless fraud is found (absent in this case), or unless the settlement is contrary to public policy (which is not here contended), such settlements cannot be invalidated by administrative fiat or even by the courts. The settlement in the instant case was certainly sufficiently formal. It was final, and not contingent, upon approval of the Board; the Board's approval was only necessary because it was named as arbitrator and had to conduct the election.

Note how the parties changed position and accepted the benefits of this agreement: The company resumed production and all the workers resumed employment; the company reluctantly granted a union shop and both unions accepted this benefit; the CIO, at long last, agreed to a Board election, as the company had originally suggested. The CIO agreed that the Independent might go on the ballot as it had itself proposed in its telegram of December 30th. The company changed its position by agreeing that the Regional Director might arbitrate the Dodrill complaint and that complaint was arbitrated by the Regional Director and the company put Dodrill back to work (R. 10, footnote 11). Dodrill, on his part, accepted the benefits. The company and the workmen got most of the benefit by the restoration of industrial peace and the ending of strife. That was the manifest purpose of the

settlement and there is no suggestion anywhere that the settlement was considered a defeat for the CIO or designed as such.

Thereafter the Board held the election and the Independent union was certified. **All parties accepted this decision without objection.** The closed shop contract was made with the Independent and posted at the plant, also without objection. It is the harsh enforcement of this closed shop contract by the Independent which has induced this court to set aside the entire settlement as a technicality, and to penalize the company for alleged bad faith.

It seems to the petitioner that the court has neglected to recognize the obligations of the petitioner under the settlement; but even more woefully neglected to recognize the bad faith on the part of the CIO and the irresponsibility of the Board in repudiating the bargain, and reversing the representations upon which the petitioner had properly relied.

Representations by Conduct. Did not the parties to this settlement agreement all act upon the assumption, and represent by their conduct, that the Independent was eligible for a closed shop contract and that such a contract was legal on the part of the employer? It may be said that the CIO union should not be held responsible for such representations by conduct, being a sort of ward of the court, or of the Board, not sui juris, and not to be held to the ordinary principles of fair dealing. While not subscribing to such paternalistic attitude, we point out in reply that the Board itself was called in and, acting in its official capacity, after investigation of charges, approved the agreement. The Board, before agreeing to act as arbitrator and election official, required withdrawal of the charges of company interference and domination. The Board then arbitrated the Dodrill complaint pursuant to the settlement; caused mutual stipulations to be entered

into, binding the parties to good behavior; held the election, and certified the Independent. Did not the Board thereby approve the assumption of the CIO, and did it not by its conduct also represent that the Independent was eligible for a closed shop contract? Was there any doubt that the certification by the Board was designed to, and did, lead the employer to bargain with the Independent and make the closed shop contract which the Board now claims is an unfair practice?

We earnestly submit that the settlement was a valid contract, and further, that the parties did by their conduct represent that the Independent and the company had legal capacity to perform it.

On what ground is this agreement, thus honestly arrived at, invalidated and set aside? After the unions have accepted the benefits of the contract and the company has changed its position, the Board says the agreement can not be carried out because, upon a second investigation of matters antedating the settlement, it appears that the Independent was assisted by the company, making it ineligible for a closed shop contract and making a closed shop contract unlawful, per statute. This is a reversal of position. This Board and the CIO now repudiate the representations which they made when the settlement was signed and which induced the Company to act. And it is the Company which must pay for the Board's mistake, if mistake it was.

In the Vernacular. Since the court has suggested that the defense of the employer is somehow technical or involved in "judicial concepts" not readily acceptable in practical affairs, the petitioner may be pardoned for placing its contentions in the vernacular. Speaking in the language of the street, it appears to the petitioner that the CIO "**welched**" on its contract after it lost. Granting humane motives to the Board, it seems to the petitioner that the action of the Board in sponsoring such repudia-

tion and in penalizing this employer for doing what the Board virtually ordered the employer to do, would be recognized on the street as the "**double cross.**"

These expressions are not elegant, but may perhaps help to illustrate the elemental character of the petitioner's grievance.

II.

The Court omits mention of, and, as it may be assumed, has overlooked, the controlling circumstance that the Board had full knowledge of all the material facts affecting the strike settlement, having made a statutory investigation of the same charges now advanced to invalidate this settlement.

The court does not mention in its opinion, and we think it fair to assume that the court has overlooked, the fact that the Board, prior to the settlement, had investigated the previous charges of company domination (Bd.'s Ex. 5; R. 312) and that the record shows that the Board knew all of the salient facts later developed (Pet. Ex. 17; R. 293, R. 272). This was an official investigation of pending charges (R. 312) authorized by Section 10 (b) of the Act. The court also fails to mention that, if there was any concealment of fact, the record shows that the Board investigator concealed facts from the responsible officials of the company. He said he wouldn't "put his cards on the table" (R. 294). The court has further overlooked the fact that the evidence, at the hearing, of assistance or domination of the company union came from officials of the CIO union. Witness Doddrill and witness Griffie were both officials of the Local (R. 75, 147). They must be held to have known the facts as well as or better than the employer. Would it not be fair for the court to acknowledge these admitted facts before it condemns the employer for relying upon the settlement? Is it not better to acknowledge and correct administrative error, than to permit injustices to

accumulate, to the discredit and perhaps destruction of the whole administrative process?

We ask that the court not overlook salient facts such as the full investigation and knowledge of the Board as to conduct prior to the settlement. We ask the court, if it proposes to authorize the Board to sponsor repudiation of settlements of this kind, that the full circumstances be acknowledged and published. This petitioner has no further recourse for what it deems to be an injustice.

The petitioner asks the court to reconsider. It believes that the correct solution is a proper judicial control of the administrative processes, not legislative abolition, arising from resentment at such excesses.

III.

The Court has approved administrative repudiation of a settlement contract without precedent therefor, either in the policy of the Board or the decisions of the courts.

First, the authorities which the Court cites do not support repudiation of the settlement. Second, the Court has discarded without due consideration the fair, practical and well recognized doctrines of estoppel, and has erroneously characterized these doctrines as technical judicial concepts affecting administrative procedure only, and irrelevant to this case.

No Precedents for Repudiation. The majority opinion supports its conclusion by citing the decisions of the Board and of the courts to show that the Board has consistently gone behind settlement agreements. Petitioner submits that the Court has misinterpreted the authorities. The Board's cases do **not** show that the Board has gone behind agreements of this type. The court decisions cited do **not** show that the courts have approved nullification of strike settlements made by the parties and fairly entered into.

In **Harry A. Halff**, 16 NLRB 667, there was no agreement between the parties but only an executory stipulation for good conduct between the Regional Director and the company and this stipulation was held no bar where it had been violated by the employer. There was no strike settlement, or election, or certification in this case.

In **Chicago Casket Co.**, 21 NLRB 235, there was an executory strike settlement and the employer agreed with the Board to take back all the strikers as conditions permitted. The Board found that the employer had not performed this settlement and held therefore that it was no bar to further prosecution of unfair practices.

NLRB v. Phillips Oil & Gas Co. (C. C. A. 3rd, 1944), 141 Fed. (2d) 304, involved a consent election and withdrawal of charges with the Board's approval and the claim was that the Board was estopped to prosecute for later unfair practices. There was no contract between the parties. The court did not consider the validity of any settlement contract.

Canyon Corp. v. NLRB, 128 Fed. (2d) 953 (CCA 8th, 1942). This was a case where the employer had made an agreement with the Board alone, recognizing a union and agreeing not to further interfere. The court held that an executory agreement of this kind "which has not been observed, does not preclude consideration by the Board of the employer's conduct preceding the agreement." There was no agreement between the parties in this case, and no change of position.

In **NLRB v. Hawk & Buck Co., Inc.** (CCA 5th, 1941), 120 Fed. (2d) 903, there was a Board proceeding which resulted in a consent order and the respondent published this as a notice, by agreement with the Board and the union. The plea was that the said prior proceedings and consent order was a bar to later complaint. The court

held the real question was whether the obligations of the agreement had been complied with and the unfair practices discontinued. There was no strike and no settlement contract. No representations were made or relied upon.

Sperry Gyroscope Co. v. NLRB (CCA 2nd), 129 Fed. (2d) 922. This again was a stipulation with the Board alone, by which the company admitted domination, withdrew recognition, and posted notices. The court held there had been a clear breach of this stipulation. There was no agreement of the parties in this case.

Matter of Locomotive Finished Materials Co., 52 NLRB 922, does not involve the repudiation of any contract of settlement because there was no such contract. Insofar as its considers the doctrine of estoppel it favors the petitioner's contentions in the present case. It appeared that an affiliated machinists union agreed to an election, without knowledge of the revival of an old independent "Association," which was thereafter placed on the ballot and won the election. There were no charges pending at the time the Board made an investigation of the status of the Association and the Board held therefore that the investigation was not notice to the Board as it was not authorized under Section 10 (b) of the Act (which requires charges to be pending to authorize investigations). Objections were promptly filed by the Machinists to the results of the election and the election was set aside. Lastly, there was clear violation of the Act by the employer. In rejecting the suggestion that an estoppel arose, the Board emphasized (1) **the absence of charges pending**; (2) called attention to the fact that there was **no change of position** by the company in reliance on the election; (3) that the **Board had no knowledge** of the real situation; and (4) the parties had never intended to dispose of the charges, which were filed after the election.

The case by inference supports the petitioner's claim when the board says: "No factual inference as to the validity of the Association can be drawn from the Machinists' conduct in this case **as might have been done had the Machinists silently permitted the Association to obtain certification and recognition by the respondent.**" (Emphasis ours.) There can be no doubt that the situation presented in the instant case is stronger due to the authorized investigation, the settlement contract, and the suggestion of the CIO itself that the "company union" be placed on the ballot, and finally the election and certification, when the CIO stood "silently by," without objection.

The doctrine of estoppel While it is admitted that the point was not exhaustively briefed by the petitioner, it is submitted that the court has nevertheless too lightly discarded the underlying principles of estoppel. These principles are firmly established as principles of substantive law by the decisions of this court. They have been characterized as "practical, fair and necessary." The writers consider these principles as "required by good morals" and essential to the administration of justice. A few of these holdings are cited below.

The plea of the petitioner was not a "technical" reliance upon estoppel. The petitioner called attention to the unfairness of the present reversal of the Board's position and claimed that such reversal was so clearly arbitrary as to constitute an abuse of administrative discretion. There can be no question that in a contract between parties sui juris, those parties should be estopped under the circumstances of this case. In this case the Board has sponsored the complaint of a union, throwing estoppel of the union to the winds.

It may be in the public interest to encourage freedom of association and collective bargaining, but it can hardly be in the public interest to encourage unions to repudiate contracts, especially settlements of industrial strife.

As to the Board itself, our complaint is simple. The Board approved a settlement and virtually ordered petitioner to make a closed shop contract. It is unfair to penalize the Company, when the Board changes its mind, and, reversing itself, holds the order of no effect.

The salutary character of the doctrine of estoppel is indicated in the following citations of authority:

> "The principle which underlies equitable estoppel in its proper sense runs through all the transactions and contracts of civilized life." 19 Amer. Jur., Estoppel, section 33.

Or again:

> "And in modern times the wisdom and justice of the principles of estoppel, especially estoppel in pais, are very generally recognized. * * * The modern view being founded upon principles of equity, morality and justice and in accord with good conscience, honesty and reason; and as such, the doctrine of estoppel subserves, if is true, the purpose as a plain, practical, fair and necessary rule of law." 21 C. J. 1063, Estoppel, Section 19 (C).

The doctrine has been approved by this court, being simply stated in **Gregg v. Von Phul** (1864), 1 Wall. 274, 17 L. Ed. 536, at 537:

> "The doctrine of estoppel in pais or by the act of the parties is founded in natural justice and is a principle of good morals as well as law.' 'The primary good of the doctrine is that it would be a fraud in the party to assert what his previous conduct had denied when on the faith of that denial others have acted.' " Citing cases.

In **Daniels v. Tearney** (1880), 102 U. S. 415, 26 L. Ed. 187, at 188, the court refers to the doctrine as a "conservator," like the statute of limitations, and goes so far as to say: "Without it society could not well go on."

Estoppel is most commonly applied in questions of legal capacity to contract. The doctrine has very commonly been applied where the question has to do with the capacity of one of the parties to contract (as in this case, involving the eligibility of the Independent for a close shop contract). The rule of estoppel in matters of capacity is stated as follows:

> "If in a particular transaction or course of dealing, the authority, capacity, character or status of one of the parties is recognized or asserted as one of the basic facts upon which the transaction proceeds, both parties are as a rule estopped to deny that the one occupied that position or sustained that character, and the rule has been applied with respect to guardians, partnerships, personal representatives, school trustees and agents." 21 C. J., p. 1237, Estoppel; Section 243.

IV.

Through no fault of petitioner and upon technical grounds the court has denied argument on the facts and with respect to the propriety of the heavy penalties imposed in this case.

Were the unfair practices willful? How is the case affected by the petitioner's reliance upon a valid settlement contract? Is there not room for a concession by the court that the legal issues were so close as to warrant appeal to the courts? These questions have not been argued or submitted.

The petitioner was advised prior to argument in this case that the court did not care to hear argument on the question of the sufficiency of the evidence.* The peti-

*The petitioner in this case, prior to argument, wrote to the Clerk of the court asking him to submit a request for enlargement of time, the petitioner feeling that a mere statement of the facts would more than absorb the half hour allowed for argument, and was advised: "The Court directs me to inform you that they do not consider it necessary to extend the time for oral argument in the cases of The Wallace Corporation and Richwood Clothespin and Dish Workers Union vs. National Labor Relations Board, Nos. 66 and 67, the reason that the court does not care to hear argument on the question of the sufficiency of the evidence."

tioner interpreted this to exclude argument on the findings of unfair practices preceding the settlement agreement and therefore closely limited the discussion of facts which are now quite evidently controlling in the majority decision.

The court has not expressly so stated, but is manifestly much influenced, in affirming the severe penalties in this case, by the Board's findings of fact on petitioner's conduct prior to the settlement. For reasons hereinafter more fully set forth, petitioner submits that due to inferences which are unsupported by the findings of the Board, the court has erroneously concluded that this petitioner, throughout, was deliberately and willfully defying the law. This was not the finding of the Board, which based its opinion on the presence of one unfair practice subsequent to the settlement, namely, the making of the closed shop contract.

The briefs and the argument of the petitioner were accordingly occupied almost exclusively with the issue posed and presented by the Board itself, namely, the construction of the closed shop clause of the statute. Petitioner in its brief reduced almost to the vanishing point its discussion of the settlement agreement as a defense, and the effect of petitioner's contractual obligations to make the closed shop contract. The point has received the scant consideration of the court, as indicated below.

As to the assessment of penalties, the propriety of such penalties in this case was not argued. It has been held by the Board that penalties are not appropriate where the employer believed it was required to deny employment under a closed shop contract, like that in the present case, and where the legal rights and obligations of the parties, under the contract were in doubt. **M. & M. Woodworking Co.**, 6 NLRB, p. 372, at 383, approved by the Circuit Court of Appeals, 9th Circuit, 101 Fed. (2d) 938.

Perhaps the court will now recognize that despite the

divergence of view represented by the minority and majority justices in this case, that the questions involved are difficult and close. It would seem to the petitioner that if the case is close enough to warrant a division in the court, petitioner should not be penalized for an erroneous solution of its dilemma. The minority opinion of this court concludes that the petitioner was right, even resolving all questions of fact against the petitioner.

The petitioner did contend in its original brief and in argument that it was manifestly unfair and improper to charge the petitioner with back pay of twelve employees who admittedly and by stipulation were not excluded by the Independent union, but by their own voluntary act failed to qualify for employment, never having applied for membership in the Independent union. If there was no discrimination by the Independent in such a case, a fortiori there can be no discrimination by the petitioner. Even this circumstance is neglected by the court.

V

The majority opinion contains findings of fact which enlarge upon the findings of the Board and are not supported by the record.

Petitioner respectfully submits that the majority opinion goes beyond the findings of the Board in a number of instances. The cumulative effect of these enlargements upon the alleged offenses of the employer may explain the punitive element of the court's decision in sustaining the penalties. The court has evidently concluded, going beyond the conclusions of the Board, that the alleged unfair practices in this case were deliberate, willful and premeditated.

Has not the court overlooked, first, that the Independent did not appear until after the strike started, and second, that the unfair practices charged against the em-

ployer rest in substantially all cases upon the doctrine of respondeat superior?

The court, for example, has stated that there was "abiding hostility on the part of the company to any recognition of the CIO union."* It is admitted by union witnesses that the issue upon which the strike was called was a question of how to determine majority representation. (See Petitioner's Brief herein, pp. 8-9, for record citations.) The company was not required by law or by the spirit of the law to asquiesce in the first demand for a card count. Only slight experience with collective bargaining demonstrates the unwisdom of accepting card counts in such cases. Is the refusal to accept a card count reasonably to be considered "abiding hostility"? Must an employer walk into the union camp or be called unfair?

The company countered with a request for a Labor Board election. At that time there was no independent union in the field. The election would have been a "yes or no" election (a form of election somewhat discredited abroad). The readiness of the company to suggest such an election rebuts the implication of any "abiding hostility."

The excuse given by the union for refusing the election was their demand that Dodrill be reinstated. The record shows no charge pending of unfair practices at that time. [The second amended charge is dated Otober 9th (R. 312). Wallace testified (R. 271) that the CIO threatened charges on the day the strike was called, so presumably no charges were then on file. The first charge was evidently about October 4, a week or more after the strike (R. 42).] The company never admitted fault in the Dodrill case but submitted it to arbitration. The company is nevertheless reproached for unfairness to Dodrill, after settling his claims. The Board itself said (R. 10, footnote 11): "Dod-

*Mr. Wallace, proprietor of this business, stated he was perfectly willing to bargain collectively with any union that had a majority (R. 270, 279); he said he thought collective bargaining was "smart" and "he was for it" (R. 279).

rill * * *, his discharge in August is not in issue in this proceeding." But in any case, hostility to Dodrill, who, he said himself (R. 151) was characterized as an "agitator"** can hardly be enlarged to an "abiding hostility" to recognition of the CIO union in the face of this record. We ask the court to distinguish between hostility to recognition of the CIO and a legal refusal by the company to accept superficial evidence of majority. Certainly the final election, which is unassailed, showing a majority by the Independent, sustains to some extent the company's doubt as to the validity of the card count method, even though the CIO strike may have alienated some of its original adherents.

The following additional examples of statements in the majority opinion are cited in support of petitioner's contention that specific conclusions of the court are not justified by the record:

1. **The Evolution of Hearsay Evidence.** The court says that the company "publicly proclaimed through one of its foremen that 'the ones that did not sign up with the CIO didn't have anything to worry about; the company would see that they was taken care of.'" This statement is no doubt based on the testimony of a witness who referred to "rumors" in the plant and to what a foreman "told us in the factory." This testimony, which the court holds significant, was based on the following "long-distance" hearsay of witness Roxie Dodrill (R. 118):

> "Q. And did you ever at any time have any conversation with your foreman Sleeth with reference to the CIO? A. Yes, sir.
>
> Q. When did you have such a conversation? A. Well, just before the strike, Mr. Sleeth and I was talking and it was rumored around the factory that——

**The court enlarges this characterization of Dodrill into a "categorization" of C. I. O. members as agitators.

Trial Examiner Spencer: If you please, just tell us what was said.

The Witness: I asked Mr. Sleeth what he told us in the factory about the company taking care of the people and he said that Mr. Davis had been down to St. Louis and had talked with Wallace and he said Wallace told him not——

Mr. Chubb: We will object again to this long distance repetition of what Sleeth said Davis said Wallace said in St. Louis. I think it is going just a little bit too far.

Mr. Shroyer: All of them, I think, are officials of the company.

Trial Examiner Spencer: I will overrule the objection. Tell us what Mr. Sleeth said to you.

The Witness: Mr. Sleeth said he was told to tell the people, the ones that did not sign up with the CIO didn't have anything to worry about, that the company would see that they was taken care of."

The testimony was by a highly interested witness about a conversation held a year previously.

Sleeth denied he made the statement (Tr. 577). Wallace corroborates Sleeth (R. 279).

Now, note the effect of this testimony: To the Board, this testimony is not evidence of what was said alone, nor of statements by a foreman (who said he had been instructed to stay neutral (Tr. 576)). It proves, in the words of the Board (R. 20): "A third foreman **disclosed that the respondent would make suitable provision for those employees who did not join the union.**"

This court then develops this same testimony into a "public proclamation."

2. **The court overlooks admitted facts** where it says "the company apparently preferred to close down this one of its two plants rather than to bargain collectively with the CIO."

We assume the court has reference to evidence of remarks of foremen prior to the strike. Mr. Wallace, however, was the President of the company and the Wallace Corporation was entirely his, the stock representing advances made by him personally prior to reorganization (R. 269).

Now, this question of preferring to close the plant rather than bargain collectively with the CIO is discussed by the Board and it has this to say (R. 14):

> "On January 12, 1942, President Wallace and William T. Christmas, Vice President and Treasurer of the respondent, who maintain offices at St. Louis, Missouri, arrived in Richwood for the avowed purpose of deciding either to reopen the plant or to close it permanently. After discussing the matter with Richwood inhabitants and Independent adherents who desired to return to work, Wallace decided to resume plant operations the next day. * * * That night respondent met with representatives of both unions. The meeting culminated in the settlement agreement dated January 13, 1942, calling for immediate cessation of the strike, and the plant resumed operations that day."

There is no dispute about the facts so stated by the Board. They rebut the statement of the court that the company preferred to close its plant down rather than bargain with the CIO. The settlement contract was a bargain with the CIO and it demonstrated a willingness to recognize them if they prevailed in the election. The course of action should be more eloquent than the strikers' reports of what the foremen said to the strikers.

3. The court is in error in making the statement that the settlement agreement plainly implied that the old employees could retain their jobs with the company simply by becoming members of whichever union should win the election.

The settlement agreement which is dated January 13, 1942, is very brief on this point, but contains no implications. (The following proviso reserving the right to "hire," evidently contains a misprint, for the word "fire." One doesn't "hire" for just cause.) It says (R. 55):

> "The company further agrees that if either union is proven to represent a majority of its employees by said vote, it will recognize a union shop, providing that the company shall at all times retain the right to suspend, hire or discharge any employee for proper and just cause."

If there is any implication in this agreement, it is to the contrary (R. 54):

> "The company agrees not to coerce or intimidate any of its employees in regard to union membership and further agrees that none of its foreman or any other of its employees not eligible to be union members shall exercise such coercion, solicitation or intimidation for either union."

4. **The court is in error** in stating that the company "admits that had there been no union shop agreement, discharge of employees **on account of their membership in the CIO** would have been unlawful discrimination contrary to Section 8 (3) of the Act." The petitioner does not recollect such an admission, but certainly did not admit the motive. The facts do not support any implication of such a motive. The court, like the Board, ascribes and imputes the motives of the Independent to the employer without any evidence in support. The company took back all CIO employees after the strike, including Dodrill, and amply evidenced its desire to reinstate the employees after the lay-off. There was no evidence whatever that the company even knew that the excluded employees were former members of the CIO. The record shows that a large number of former CIO members were re-employed by the com-

pany and were kept on the pay roll after the time of the lay-off (R. 123, Smith and seven others; R. 124, Givens; Green, R. 192). The dividing line was, of course, employees who had joined the Independent, and those who had not. This was the dividing line required by the closed shop contract and had no reference to membership in the CIO.

5. **The court in its majority opinion overlooks the fact that twelve of the discharged employees never applied for membership in the Independent union** (R. 99). It is respectfully submitted that, with respect to these there was no act of discrimination on the part of the Independent nor on the part of the company. The line of exclusion from employment was not the line of exclusion from membership in the Independent. Penalizing the company for the inaction of these employees must surely be an oversight.

6. **The court has misconstrued the correspondence between the company and the Regional Director.**

The correspondence subsequent to March 20, 1942, between the Regional Director and the company (principally by counsel) was introduced in the record to show two facts: first, that the company **thought** it was bound to the course it took, and, second, to show that the Regional Director, up to the time of the complaint, never claimed that the company had violated the settlement contract. The Board, it will be recalled, had charged (and in its first opinion found) violation of the settlement agreement by the company, which would certainly have disposed of this case. This opinion was, of course, vacated (R. 5).

At the hearing the first effort of the petitioner was to show its own compliance with the settlement which it was pleading. Its first task was to show that there was no violation of the settlement agreements between the date of the settlement and the date of the election.

The court gives considerable weight to this correspondence. It is evidently the basis upon which the court concludes that the union shop contract was entered into against the advice of counsel. If the court implies that counsel had advised that it was illegal to make such a contract, then the inference of the court is clearly unwarranted. The record shows a letter dated April 13, 1942 (Resp. Ex. 22, R. 299), in which counsel made it clear to the Board that he did not approve the closed shop policy of the law and for this reason had advised against making the closed shop stipulation in settlement. The letter shows on its face, however, that counsel considered that the contract for a closed shop was legal. The very same letter states the opinion of counsel that it would be a violation of the contract to return the people to work. Counsel asked for some illumination on that question. The letter also comments on the Vacuum Electric case. Counsel in the previous letter of April 6th had denied any interference with the Independent union which, of course, would deny the application of the Vacuum Electric case.

Counsel plainly stated that there was no vice in the contract, and took, in substance, the position which was urged before the Board and which is now urged before this court. Any other conclusion reflects upon the sincerity of counsel in this case.

The company signed the closed shop contract, not because it liked it, but because it feared stoppage (R. 224) and breach of contract if it didn't. That was the "necessity" referred to by counsel. Counsel and the company may have been mistaken, but there was no opinion of counsel that the course was illegal, nor any refusal to follow legal advice.

The Court judges from the correspondence that there was "something more" that this employer could have done when it received the urgent request of the Regional Director that it reinstate the employees. Petitioner has

never understood the Regional Director's request. On its face it looked like a request for inaction pending decision. Actually it was a request to reinstate. The request required complete reversal of position, namely, employment of non-members of the Independent who had already been laid off, and breach of the closed shop contract. The employer feared that this would again close the plant. (R. 224).

The Board then suggested and the Court now suggests, in other words, that the petitioner should have reinstated the discharged employees forthwith. This was not only to risk another stoppage of the plant—it was to risk the entire settlement and run the danger of renewed discord. It was flying in the face of the contract and of the warnings which the petitioner had previously received not to interfere in union matters. The request of the Board was unreasonable in the opinion of the petitioner under all the circumstances. After all the trouble it had had, the petitioner was more than justified in "hewing to the line."

7. **Clarification of the language of the court is desirable** to limit the responsibility of employers for union exclusion.

While it may not be significant to the legal profession, petitioner has noted some lay discussion of the majority decision in this case which bears out the minority opinion that the decision may prove embarrassing. In David Lawrence's widely syndicated newspaper column, as an example, printed in the St. Louis Globe-Democrat December 31, 1944, Mr. Lawrence cites this decision of the court in connection with the seizure of Montgomery Ward by the government in the controversy over the "maintenance of membership" clause. Mr. Lawrence quotes the statement of the Court that the petitioner was not "compelled by law to enter into a contract under which it knew that discriminatory discharges of its employees were bound to occur."

Says Mr. Lawrence: "This is precisely the contention of Ward's. Mr. Avery argues that one worker who does not join the union can be retained on the job, but the employer must dismiss a fellow worker who, having joined a union, finds the dues or the rules irksome and wants to resign." Mr. Lawrence also quotes at length the minority opinion to show that Congress never has undertaken to regulate union practices.

Did the court anticipate that this decision would give comfort to Mr. Sewell Avery?

The Area of Disagreement in this case. We take it that both minority and majority Justices are agreed that employer interference in union affairs is undesirable and unwarranted. We take it also that minority and majority would agree that "the spirit of exclusion" which is a phase of the closed shop may be undemocratic and oppressive.

The court divides on the question of the employer's function. The majority Justices conceive of a trade union not only as subject to governmental protection from employers, but also subject to employer regulation, placing a responsibility on the employer to protect minorities from majority unions where the latter exclude the former. The minority Justices, on the other hand, conceive of unions as autonomous, responsible associations, governing their own affairs, free from employer interference, subject only to legislative controls. Unions are coming of age, on this theory, and some public regulation may be the next step. It follows that if there are abuses in union practice, they should be regulated directly and not through a mischievous delegation of authority to the employer, placing upon him the responsibility for deciding when the unions are or are not unfair to the minorities, at the same time that he bargains in his own behalf for the best terms he can get from the majority.

Petitioner goes one step further and claims that any self-respecting trade union should expect to be held to responsibility for honorable performance of its just obligations. It does not and should not follow that, because the law protects unions from employer interference, it intends to degrade them to a place of legal dependency, and irresponsibility for their own obligations. Quite the reverse should be inferred. The grant of privileges and immunities should increase responsibility.

Petitioner agrees that the battle of the unions for recognition and equality before the law has virtually been won. The minority Justices have correctly sensed the spirit of the times. A frank and temperate recognition at this time of union abuses, and of the helplessness of the National Labor Relations Board to remedy them under the present statute, can do no injury to the progress that organized labor has made. A patent injustice to an employer, as in the majority interpretation of the Act, may multiply resentment and produce disunity far more dangerous to progress.

CONCLUSION.

The court has manifestly given close attention to this case, and it is only the importance of the issues which could justify a request for rehearing.

While the case itself is not of any magnitude, it involves common and significant attitudes in the employer-employee relationships. The petitioner believes further that important legal and ethical principles are at stake.

Moreover, it is difficult to take a detached and dispassionate view of cases of this kind. The controversy lies at the nerve center of economic conflict.

Petitioner asks no more than this: That the court respond in the same spirit in which the petition is addressed to the court. This case was moderately and tolerantly presented, to minimize violence and ill feeling. The court

may have observed that the petitioner has not attacked unionism generally or even the CIO; petitioner has attacked only the repudiation of a bargain and of an honest settlement. Petitioner has even limited his attack on the closed shop policy to the undemocratic exclusionary features of the closed shop. Petitioner, moreover, has not attacked the National Labor Relations Act. Petitioner has asked only recognition that the Act does not in fact purport to place curbs on union excesses. Nor has the petitioner attacked the good faith of the Board. Petitioner insists merely that in its preoccupation with enforcement of the Act, the Board has placed too low a value upon scrupulous observance of contract obligations. These principles are just as essential to unionism as they are to other business interests. They are even more vital to administrative procedure than to the courts of justice. The petitioner is distressed that the court has not seen fit to render some slight homage to the wisdom of these principles.

The principles of fair dealing should not be dismissed as mere "middle class morality." There is a certain sly wisdom in the saying of the French that "The bourgeois heart is on the left, but his pocket book is on the right." Fundamental ethical principles, however, antedate both the industrial revolution and our judicial system. They constitute a common element permeating all religions. They should be quite adequate to unify the intellectual and emotional disunity of the passing economic conflict.

This brief is written at a time when, in the wake of our liberating armies in Europe, contending factions are fighting in the streets of Athens, as they have fought in other liberated countries. There surely could be no prospect more discouraging to the friends of democracy and to the lovers of freedom. No one can evaluate the factors that have brought about such disunity—misery, oppression, age-old resentments. We only know that the economic

struggle is involved, more than political issues, and we know that there has been a failure of the forces of reconciliation.

In the American scene, we have never approached the distrust, hatred and doctrinaire theories which have divided Europe. Some of us live in the faith that this may be due in substantial degree to our traditional devotion to reasoned judicial processes. Petitioner, in loyalty to these processes, has prosecuted and submitted this case, upon the philosophy that the good can be distilled and recognized, and the evil disowned, on either side of the conflict between organized labor and the opposing interests. With due deference to the court, the petitioner believes that further consideration may serve to reconcile the wide divergence of opposing views in this case, and thus moderate the punitive features of the court's decision.

Respectfully submitted,

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LEWIS, RICE, TUCKER, ALLEN & CHUBB,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

Nos. 66 and 67. OCTOBER TERM, 1944.

The Wallace Corporation, Petitioner, 66 *vs.* National Labor Relations Board.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.
Richwood Clothespin & Dish Workers' Union, Petitioner, 67 *vs.* National Labor Relations Board.	

[December 18, 1944.]

Mr. Justice BLACK delivered the opinion of the Court.

In an attempt to settle a labor dispute at the plant of petitioner company, an agreement approved by the Board was signed by a C.I.O. union, an Independent union, and the company. At a consent election held pursuant to this agreement, Independent won a majority of the votes cast,[1] and was certified by the Board as bargaining representative. The company then signed a union shop contract with Independent, with knowledge—so the Board has found—that Independent intended, by refusing membership to C.I.O. employees, to oust them from their jobs. Independent refused to admit C.I.O. men to membership and the company discharged them.

In a subsequent unfair labor practice proceeding the Board found that (1) Independent had been set up, maintained, and used by the petitioner to frustrate the threatened unionization of its plant by the C.I.O., and (2) the union shop contract was made by the company with knowledge that Independent intended to use the contract as a means of bringing about the discharge of former C.I.O. employees by denying them membership in Independent. The Board held that the conduct of the company in both these instances constituted unfair labor practices. It en-

[1] Of 207 eligible employees, 98 voted for Independent, 83 for the C.I.O., and 26 did not vote.

tered an order requiring petitioner to disestablish Independent, denominated by it a "company union"; to cease and desist from giving effect to the union shop contract between it and Independent; and to reinstate with back pay forty-three employees, found to have been discharged because of their affiliation with the C.I.O., and because of their failure to belong to Independent, as required by the union shop contract.[2] The Circuit Court of Appeals ordered enforcement of the Order.[3] We granted certiorari because of the importance to the administration of the Act of the questions involved. 322 U. S. 721.

The Board's findings if valid support the entire order. This is so because Section 8(3) of the Act[4] does not permit such a contract to be made between a company and a labor organization which it has "established, maintained or assisted."[5] The Board therefore is authorized by the Act to order disestablishment of such unions and to order an employer to renounce such contracts.[6] Nor can the company, if the Board's findings are well-grounded, defend its discharge of the C.I.O. employees on the ground that the contract with Independent required it to do so. It is contended that the Board's findings are not supported by substantial evidence. As shown by its analysis, the Board gave careful consideration to the evidence before it relating to the unfair labor practices which occurred both before and after the settlement agreement and the certification. The Circuit Court of Appeals unreservedly affirmed the Board's findings, and we find ample substantiating evidence in the record to justify that affirmance. We need therefore but briefly refer to the circumstances leading to the Board's order.

The findings of the Board establish the fact of an abiding hostility on the part of the company to any recognition of a C.I.O. union. This hostility we must take it extended to any employee who did or who might affiliate himself with the C.I.O. union. The company apparently preferred to close down this one of its two

[2] 50 N. L. R. B. 138.

[3] 141 F. 2d 87.

[4] Section 8(3) contains a proviso to the effect that nothing in the Act "shall preclude an employer from making an agreement with a labor organization (*not established, maintained, or assisted by any action defined in this Act as an unfair labor practice*) to require as a condition of employment membership therein . . . ." (Italics added.)

[5] Labor Board v. Electric Vacuum Cleaner Co., 315 U. S. 685, 694.

[6] I. A. of M. v. Labor Board, 311 U. S. 72, 81-2; Labor Board v. Falk Corp., 308 U. S. 453, 461.

plants rather than to bargain collectively with the C.I.O. It publicly proclaimed through one of its foremen that ". . . the ones that did not sign up with the C.I.O. didn't have anything to worry about . . . the company would see that they was taken care of." The settlement agreement plainly implied that the old employees could retain their jobs with the company simply by becoming members of whichever union would win the election. Nevertheless, the company entered into an agreement with Independent which inevitably resulted in bringing about the discharge of a large bloc of C.I.O. men and their president.

The contract was executed after notice to the company by the business manager of Independent that Independent must have the right to refuse membership to old C.I.O. employees who might jeopardize its majority. This business manager, who had himself originally been recommended to Independent by a company employee, wrote the company, prior to the making of the contract, that Independent insisted upon a closed shop agreement because it wanted a "legal means of disposing of any present employees" who might affect its majority, and "who are unfavorable to our interests." The contract further significantly provided that the company would be released from the clause requiring it to retain in its employ union men only, if Independent should lose its majority and the C.I.O. win it.[1]

Neither the Board nor the court below found that the company engaged in a conspiracy to bring about the discharge of former C.I.O. members. Both of them, however, have found that the contract was signed with knowledge on the part of the company that Independent proposed to refuse to admit them to membership and thus accomplish the very same purpose. By the plan carried out the company has been able to achieve that which the Board found was its object from the beginning, namely, to rid itself of C.I.O. members, categorized by its foreman as "agitators."

It is contended that the Board's finding as to company domination has no support in the evidence because the evidence as to company domination antedated the settlement and certification, and hence was improperly admitted. The argument is that the

[1] The contract reads: "It is mutually agreed by both parties hereto that should the Union at any time become affiliated in any way with any labor organization or federation having membership or local union affiliations in more than one town outside of the City of Richwood, West Virginia, this clause (E) of Article I shall immediately become null and void, ...".

Board cannot go behind the settlement and certification. The petitioner does not argue that any language appearing in the Labor Relations Act denies this power to the Board, but relies upon general principles on which the judicial rule governing estoppel is based. Only recently we had occasion to note that the differences in origin and function between administrative bodies and courts "preclude wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts." *Federal Communications Commission* v. *Broadcasting Co.*, 309 U. S. 134, 143. With reference to the attempted settlement of disputes, as in the performance of other duties imposed upon it by the Act, the Board has power to fashion its procedure to achieve the Act's purpose to protect employees from unfair labor practices. We cannot, by incorporating the judicial concept of estoppel into its procedure, render the Board powerless to prevent an obvious frustration of the Act's purposes.

To prevent disputes like the one here involved, the Board has from the very beginning encouraged compromises and settlements.[8] The purpose of such attempted settlements has been to end labor disputes, and so far as possible to extinguish all the elements giving rise to them. The attempted settlement here wholly failed to prevent the wholesale discard of employees as a result of their union affiliations. The purpose of the settlement was thereby defeated. Upon this failure, when the Board's further action was properly invoked, it became its duty to take fresh steps to prevent frustration of the Act. To meet such situations the Board has established as a working rule the principle that it ordinarily will respect the terms of a settlement agreement approved by it.[9] It has consistently gone behind such agreements, however, where subsequent events have demonstrated that efforts at adjustment have failed to accomplish their purpose, or where there has been a sub-

[8] Apparently more than 50% of all cases before it have been adjusted under its supervision. See First Annual Report of the National Labor Relations Board (1936), pp. 30-31; Second Annual Report (1937), pp. 15-15; Third Annual Report (1938), pp. 20-22; Fourth Annual Report (1939) pp. 19-22; Fifth Annual Report (1940), pp. 14, 16-18, 20, 26; Sixth Annual Report (1941), pp. 14-15, 25, 26, 27, 29; Seventh Annual Report (1942), pp. 22-25, 28-30, 80-86; Eighth Annual Report (1943), pp. 20-23, 91, 92.

[9] Matter of Corn Products Refining Co., 22 N. L. R. B. 828, 828-829; Matter of Wickwire Brothers, 16 N. L. R. B. 316, 325-326; Matter of Godchaux Sugars, Inc., 12 N. L. R. B. 568, 576-579; Matter of Shenandoah Dives Mining Co., 11 N. L. R. B. 885, 888; cf. Matter of the Locomotive Finished Material Company, 52 N. L. R. B. 922, 927.

sequent unfair labor practice.[10] We think this rule adopted by the Board is appropriate to accomplish the Act's purpose with fairness to all concerned. Consequently, since the Board correctly found that there was a subsequent unfair labor practice, it was justified in considering evidence as to petitioner's conduct, both before and after the settlement and certification.

The company denies the existence of a subsequent unfair labor practice. It attacks the Board's conclusion that it was an unfair labor practice to execute the union shop contract with knowledge that Independent at that time intended to deny membership to C.I.O. employees because of their former affiliations with the C.I.O. It admits that had there been no union shop agreement, discharge of employees on account of their membership in the C.I.O. would have been an unlawful discrimination contrary to Section 8(3) of the Act. But the proviso in Section 8(3) permits union shop agreements. It follows therefore, the company argues, that, inasmuch as such agreements contemplate discharge of those who are not members of the contracting union, and inasmuch as the company has no control over admission to union membership, the contract is valid and the company must discharge non-union members, regardless of the union's discriminatory purpose, and the company's knowledge of such purpose. This argument we cannot accept.

The duties of a bargaining agent selected under the terms of the Act extend beyond the mere representation of the interests of its own group members. By its selection as bargaining representative, it has become the agent of all the employees, charged with the responsibility of representing their interests fairly and impartially. Otherwise, employees who are not members of a selected union at the time it is chosen by the majority would be left without adequate representation. No employee can be deprived of his employment because of his prior affiliation with any par-

[10] Matter of Locomotive Finished Material Company, *supra*, 926-928; Matter of Chicago Casket Company, 21 N. L. R. B. 235, 252-258; Matter of Harry A. Halff, 16 N. L. R. B. 667, 679-682; cf. Matter of Wickwire Brothers, *supra*. The courts have approved the Board's practice in this respect. N. L. R. B. v. T. W. Phillips Gas & Oil Co., 141 F. 2d 304, 305-6 (C. C. A. 3); N. L. R. B. v. Hawk & Buck Co., 129 F. 2d 903, 904-5 (C. C. A. 5); N. L. R. B. v. Thompson Products, Inc., 159 F. 2d 363, 366-67 (C. C. A. 6); Canyon Corp. v. N. L. R. B., 128 F. 2d 953, 955-956 (C. C. A. 8); Sperry Gyroscope Co. v. N. L. R. B., 129 F. 2d 922, 931 (C. C. A. 2). See Warehousemen's Union v. N. L. R. B., 121 F. 2d 64, 68-69 (App. D. C.) cert. den. 314 U. S. 674.

ticular union. The Labor Relations Act was designed to wipe out such discrimination in industrial relations. Numerous decisions of this Court dealing with the Act have established beyond doubt that workers shall not be discriminatorily discharged because of their affiliation with a union. We do not construe the provision authorizing a closed shop contract as indicating an intention on the part of Congress to authorize a majority of workers and a company, as in the instant case, to penalize minority groups of workers by depriving them of that full freedom of association and self-organization which it was the prime purpose of the Act to protect for all workers. It was as much a deprivation of the rights of these minority employees for the company discriminatorily to discharge them in collaboration with Independent as it would have been had the company done it alone. To permit it to do so by indirection, through the medium of a "union" of its own creation, would be to sanction a readily-contrived mechanism for evasion of the Act.

One final argument remains. The company, it is said, bargained with Independent because it was compelled to do so by law. The union shop contract to which the company at first objected, but into which it entered against the advice of counsel, was the result of that bargaining. The company, it is pointed out, persistently though unsuccessfully sought to persuade Independent to admit C.I.O. workers as members of Independent. Hence, we are told, the company did all in its power to prevent the discharges and should not be held responsible for them. Two answers suggest themselves: First, that the company was not compelled by law to enter into a contract under which it knew that discriminatory discharges of its employees were bound to occur; second, the record discloses that there was more the company could and should have done to prevent these discriminatory discharges even after the contract was executed. Immediately after the discharge of this large group of employees, the Labor Board complained to the company. The company appealed in writing to Independent's business manager to admit the men to membership, and thus make possible their reinstatement. This appeal was rejected. The Board then called to the company's attention our decision in *National Labor Relations Board* v. *Electric Vacuum Cleaner Co.*, 315 U. S. 685, asserting that under its authority the men had been illegally discharged

and should be reinstated. In subsequent correspondence, the Board suggested to the company that if it should later be required to reinstate the discharged employees, it would have only itself to blame, since it had voluntarily dispensed with their services. It insisted that the company was taking a needless risk of liability because if the Board should hear charges and dismiss them, the men could then be discharged, but if on the other hand, the Board should sustain the complaint, the discharged employees "would have retained their positions and your client would have no further liability because of their wrongful discharge." The Board's representative at that time wrote the company, "I again beseech you to return them to work pending a decision of the National Labor Relations Board on this question."

It follows from what we have said that we affirm the judgment of the court below approving the order of the Board in its entirety.

Affirmed.

SUPREME COURT OF THE UNITED STATES.

Nos. 66 and 67.—October Term, 1944.

The Wallace Corporation, Petitioner, 66 *vs.* National Labor Relations Board. Richwood Clothespin & Dish Workers' Union, Petitioner, 67 *vs.* National Labor Relations Board.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[December 18, 1944.]

Mr. Justice Jackson, dissenting.

A more complete statement of the facts than is found in the Court's opinion is necessary to disclose the reasons why the Chief Justice, Mr. Justice Roberts, Mr. Justice Frankfurter, and I dissent.

The Wallace Manufacturing Company employs about 200 employees and makes clothespins and similar wood products at Richwood, a small community in West Virginia. In July 1941 a union affiliated with the C.I.O., which after the practice of the Court's opinion we will call the C.I.O., began to organize these employees, and the Company engaged in counter measures. Without detailing the evidence or considering the merits of the Company's objections we will assume that the Company during this period was guilty of unfair labor practices.

On September 25, the C.I.O. called a strike. About October 2, the Independent union, one of the petitioners here, came into being. On October 10, 1941, the C.I.O. filed charges with the Labor Board, alleging among other things that the Company had violated the Act by sponsoring the formation of the Independent. Again, without weighing the evidence or the objections of the Company or of the Independent, we will assume that the Company was guilty.

On October 14, the Independent demanded recognition as bargaining representative of the employees, and on October 31, it

filed with the Labor Board a petition for investigation and certification of it as the representative of the Company's employees.

The Board, however, did not proceed on either the complaint or the request for certification. Instead, as the Government states, "During the ensuing two and one-half months, representatives of petitioner [the company], the Board, and the two unions engaged in negotiations looking toward settlement of the entire controversy, including disposition of the Union's charge and the Independent's petition." Again, without considering the Company's or the Independent's objection or evidence, we will assume that during this two and a half months the Company engaged in unfair labor practices. The strike was proceeding, however, with much bitterness and some violence. On December 30, the strike then being in its fourth month, the C.I.O. by telegram offered, with the approval of the Labor Board, to enter into a consent election "with you and your Company Union, on the condition that when we prove a majority and become the exclusive bargaining agency for all your employees, that as a condition of employment all eligible employees must become members of Local Union 129, U.C.W.O.C." The closed-shop proposal was thus first brought forward by the C.I.O. On January 13, the C.I.O. and the Independent and the Company signed an agreement that the plant should be opened, that everyone should return to work, that the Company would not in any way influence its employees for or against either union, and that the unions would not exercise any coercion. The Company agreed to recognize as exclusive bargaining agent whichever union was proved by a vote conducted by the Board to represent a majority of its employees and to start negotiations immediately after the result of the election was determined and to grant a union shop. All parties are agreed that they employed "union shop" as the equivalent of "closed shop." There is no finding and no evidence that at the time the company entered into this obligation it had any foreknowledge as to which union would win or what the practice of either as to admission of members would be, nor is there any evidence that either union had decided upon any policy in anticipation of victory. There is, no charge, no finding, and no evidence that the Company has not performed its part of this agreement scrupulously.

The parties took this agreement to the office of the Board's regional manager and on January 19 two agreements were drawn: one by which the C.I.O. withdrew the charges of domination and other charges; and the other for a consent election to determine the employees' choice of representative. Both of these agreements, after signature by all the parties, were approved in writing by the Regional Director, acting on behalf of the National Labor Relations Board and with full knowledge of the agreement that the Company would give to the winner a closed shop.[1]

The employees, without distinction as to union affiliation, all returned to work. The election was held January 30, under the auspices of the Board. Of the 186 valid votes cast, the Independent received 98, the C.I.O. 83, and 5 votes were cast for neither. The C.I.O. filed no objections, and the Board on February 4 certified the Independent as the exclusive bargaining agent for the employees in the plant.

Thereupon the Company bargained with the certified representative, as it was required by law to do. The evidence is uncontradicted that the Company was reluctant still to enter into a closed-shop agreement. The Independent, however, insisted that the Company perform the contract by which the strike had been settled. It stated its position in a letter in which it said: "The 'Closed Shop' will, therefore, give us some control in preventing the hiring of additional employees who are unfavorable to our interests and who would further jeopardize our majority. It would also provide us with a legal means of disposing of any present employees, including Harvey Dodrill whom our members have declared by unanimous ballot that they will not work with, whose presence in the plant is unfavorable to our interests because those who are so unfavorable will not be permitted to become members of our organization and without such membership they would not be permitted to work in the plant under a closed shop contract which we respectfully insist that we *must* have."

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[1] The Board has declared its policy with respect to consent elections as follows: "However, the Board does not ordinarily order elections in the presence of unremedied unfair labor practices, whether merely alleged or already found by the Board, unless the labor organization which instituted the charges has agreed in advance that it will not rely upon the unfair labor practices as a basis for objecting to the conduct or results of the election. The Board orders an election only when it is satisfied, after considering all evidence, respecting the employer's compliance with a prior order concerning unfair labor practices that 'an election free from all employer compulsion, restraints and interference, can be held.'" Eighth Annual Report (1943) 49.

This is the first knowledge it is claimed the Company had or should have had of the Independent's adoption of an exclusionary policy toward its rivals. The Company yielded, considering the union's membership policy as something it could not interfere with, and the closed shop contract was signed. It required that all present and future employees should become members of the Independent within ten days of the date of the contract or from the date of hiring. The contract and notice of the closed shop arrangement were posted in the plant. On March 18, forty-three employees were dismissed, on demand of the Independent, as not eligible for employment because of non-membership in it. Later it appeared that twelve such dismissed employees never made application for membership in the Independent and thirty-one members who had applied for membership had been rejected because when their applications came before the meeting in regular course they did not receive the number of ballots necessary under its by-laws to elect to membership. Whether the Company knew that they had applied for membership and had been rejected is disputed, but again we resolve the doubt against the Company and assume that the superintendent knew this fact at the time of discharge.

There is no dispute, however, that when Mr. Wallace, the president of the company, learned of the discharge he attempted to persuade the Independent to allow these employees to be reinstated. On March 20, 1942, he wrote to the business agent of the Independent a letter. The Board has not found that it was not written in good faith. To the contrary, counsel for the Board with commendable candor stated that there is no evidence and that he made no contention that it was other than a good faith statement of the Company's position. Among other things it says, "When our Mr. Christmas talked to you on March 9th, you will recall that he appealed to you to see that the closed shop clause, which your Union insisted be included in the working agreement, should not be used in any way to unfairly prevent any person from working who wanted to work. We realize, of course, that the contract does not give the Company the right to tell the Union who to admit as members, and for that reason Mr. Christmas' talk with you and mine over the telephone could only be directed to the sense of fairness which we believe exists in the minds of your members.

"Entirely aside from the fact that having to lay off this large number of experienced people will badly cripple our production which is urgently needed, we feel that it is indeed a sad situation where, account of some individual differences of opinion, people who have perhaps been friends and neighbors for many years cannot work together. I will appreciate your advising me what can be done."

The Regional Director of the Board was notified of the discharges and, as the Court's opinion states, he did urge the Company to disregard its closed-shop contract and re-employ non-members of the certified union. The Company's counsel reminded him that he had expressed concern about the closed-shop provision to the Regional Director when it was being negotiated, and that the Director had replied that he probably "would have to agree to it as the C.I.O. certainly would have insisted upon it if they had prevailed in the election." The Company insisted that "membership in the union is beyond the Company's control" and that unless the union relented it would stand by the closed-shop contract. The Company suggested, however, to the Independent that it conduct interviews with those it had rejected and reconsider them individually. The Union by unanimous vote rejected the suggestion. The Regional Director of the Board also wrote to the head of the Independent about the individuals discharged "because they were not members of your union. It develops that your union is unwilling to accept them into membership. I need not remind you of the seriousness of these charges." The Board representatives were unable to persuade the union to accept the rejected members nor the Company to repudiate its agreement.

At the opening of the hearing before the examiner July 9, 1942, the Company declared it was "ready to take any steps which are necessary to the end that these people be put back to work, as it has been throughout, since this agreement was entered into." It suggested that the attorney for the Board and the attorney for the Independent work out a settlement. The Board's attorney expressed "to the representative of the Company my thanks for the suggestion." Adjournment was taken and counsel for the union went from Summerville, the place of hearing, to Richwood and attended a meeting of the Independent union. The Board attorney's objection kept further developments out of the record except that he stated: "I am willing to let the record show that

Mr. Kitchie [attorney for the Independent] made me a proposition which I was unable to accept and that I made him one which he was unable to accept." The case therefore proceeded against the Company.

The Board did not find any unfair labor practice on the part of the Company between the date of the settlement agreement and the election. In fact, it refused to accept the recommendation of the trial examiner for such a finding, saying that "such interference, if any, was too trivial," was known to the C.I.O., which made no objection to the certification, and had come to the knowledge of the Regional Director prior to the election. "Nevertheless, he proceeded with the election, found it to be a fair one, and certified the Independent."

No unfair labor practices at any time after the settlement agreement are found or charged against the employer except the making and performing of the closed-shop agreement. The Board states its position as follows: "The issue remains whether, by entering into the closed-shop contract with the Independent with knowledge that the Independent intended to exclude employees from membership and by discharging employees denied membership in the Independent, as set forth above, the respondent violated the Act. The respondent contends that it was bound to enter into a closed-shop contract by the terms of the election agreement between the respondent, the Union, and the Independent, and urges the Board to regard the discharges as proper since made pursuant to the closed-shop contract.

"We do not agree. An employer may not enter into a closed-shop contract which to his knowledge is designed to operate as an instrument for effecting discrimination against his employees solely because of their prior union activities. The proviso in Section 8(3) of the Act permits an employer to enter into an agreement with the duly designated representative of his employees, requiring membership in that organization as a condition of employment. It is true that under the terms of the election agreement the respondent was bound to execute a union-shop contract with the victorious union. It by no means follows, however, that the respondent was also bound by the election agreement to acquiesce in a scheme to penalize employees whose choice of representatives was not that of the majority; nor can the proviso in Section 8(3) be thought to countenance such a result.

". . . The facts in the case make it apparent that the respondent [Company] was put on notice that its [Independent's] real purpose was to bar from future employment with the respondent persons who had adhered to the charging Union in the election campaign. While the tripartite agreement of January 13, 1942, may have been valid when made, performance of its terms did not require the respondent knowingly to become a party to the Independent's plan to eliminate from respondent's pay roll employees solely because of their past union activities. On the contrary, when this unlawful scheme became known to it, the respondent not only had a right to abrogate the tripartite agreement, but also was under an affirmative obligation to do so. . . . Under these circumstances, the closed-shop agreement cannot be deemed a defense, but a discriminatory device to insure perpetuation of the Independent and thus deprive employees of their statutory right to select bargaining representatives."

Holding that execution and performance of the closed-shop agreement after the settlement and certification by the Board were "unfair labor practices," the Board held them effective also to revive the old charges settled by the agreements and election and it went back to those events to find grounds on which to hold that the employer dominates the Independent.

Accordingly it ordered that the Company disestablish and withdraw all recognition from the Independent as representative of any of its employees. It forbade "any continuation, renewal, or modification of the existing contract which would perpetuate the conditions which have deprived employees" of their jobs; it ordered the Company to cease giving effect to any contract between it and the Independent or to any modification or extension thereof. It also ordered that the Company "offer the aforesaid 43 employees immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and to make them whole for any loss of pay they may have suffered."

The underlying question is, in the language of the Board's brief, "Whether petitioner by entering into and discharging employees pursuant to the terms of the closed-shop contract with the Independent violated Section 8(3) and (1) of the Act." It is one of importance far beyond this little company and its two hundred employees.

Section 8(3) makes it an unfair labor practice for an employer, by discrimination, to encourage or discourage membership in any labor organization. If it ended there it would of course outlaw any closed shop, for the very essence of the closed shop is that the employer discriminates in employment to require membership in a particular union. To validate discrimination in such circumstances a proviso follows that no law of the United States "shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees. . . ."

At the time this closed shop agreement was made the Board had certified the Independent as representative of the employees. Under Section 8 it would have been an unfair labor practice had the Company refused to bargain with it. The Board made the certification, without objection by the defeated C.I.O. and with full knowledge that the Company was bound in law and in good faith to give the certified union a closed shop contract. We do not say, and it is not necessary now to decide, that the Board has no power to protect minorities at this stage of the proceedings. We do not mean to preclude the power of the Board, when the contract settling the strike, withdrawing charges against the company, and consenting to an election with a closed shop to the winner was brought to the Board, to have refused to dismiss charges and undertake an election unless each union agreed that, if it won a closed shop, it would open the union to membership from the losers on terms the Board deemed fair. Since no one could tell who would win, this would in any event have been an impartial arrangement. Even after the Independent won, the Board before certifying it might perhaps properly have made conditions as to reasonable terms to the defeated. But the Board made no conditions or reservations of the sort. Instead, it takes the position, and the Court is holding, that such conditions must be imposed on the union by the employer. He must see that the union with which he has been ordered to bargain makes proper terms for admission into that certified union of its former enemies and rivals. We think that the decision to that effect is not only unauthorized by Congress, but is utterly at war with the hands-off requirements which the law lays upon the employer, and that

this decision is at war with one of the basic purposes of labor in its struggle to obtain this Act and of Congress in enacting it.

Of course the closed shop is well known in labor relations. Its essential philosophy is that once the employees have chosen their representative union, it is entitled to bargain for the employer's help to maintain its control. Other employer aids to a dominant union, such as the check-off, are also conceded to unions by bargaining on behalf of a majority when they would not be at all permissible for the employer to use in the first place to influence the workmen to choose a particular union because he favored it. But the idea of the closed shop is that, while these acts of influence or pressure on workmen are unfair when exerted by the employer in his own interest, they are fair and lawful when enforced by him as an instrument of the union itself. A closed shop is the ultimate goal of most union endeavor, and not a few employers have found it a stabilizer of labor relations by putting out of their shops men who were antagonistic to the dominant union, thus ending strife for domination. It puts the employment office under a veto of the union, which uses its own membership standards as a basis on which to exclude men from employment.

Neither the National Labor Relations Act nor any other Act of Congress expressly or by implication gives to the Board any power to supervise union membership or to deal with union practices, however unfair they may be to members, to applicants, to minorities, to other unions, or to employers. This may or may not have been a mistake, but it was no oversight. We suppose that there is no right which organized labor of every shade of opinion in other matters would unite more strongly in demanding than the right of each union to control its own admissions to membership. Each union has insisted on its freedom to fix its own qualifications of applicants, to determine the vote by which individual admissions will be granted, to prescribe the initiation or admission fees, to fix the dues, to prescribe the duties to which members must be faithful and to decide when and why they may be expelled or disciplined. The exclusion of those whose loyalty is to a rival union or hostile organization is one of the most common and most understandable of practices, designed to defend the union against undermining, spying, and discord, and possible capture and delivery over to a rival. Some unions have battled to exclude Communists, some racketeers, and all to exclude those deemed disloyal to their purposes. See *Will*

iams v. *Quill*, 277 N. Y. 1, 7; *Miller* v. *Ruehl*, 166 Misc. 479, 2 N. Y. S. 2d 394.

There are those who think that the time has come when unions should be denied this control over their own affairs. However this may be, we only know that Congress has included no such principle expressly in the Act. If the Board should attempt to exercise it as we have suggested by way of a condition on its conducting an election or making a certification, a question of its statutory power to do so might arise, on which we express no opinion. It would at least be a forthright exercise of power over the unions by the Board itself acting in the public interest and would not require an employer to engage in interference with union affairs in direct violation of the Act.

But the Court is deciding not only that without authority of Congress the admission practices of a labor organization having a closed shop may be policed, but also, contrary as we think to the Act, that the employer is empowered and required to do the policing. This we think defies both the express terms and the philosophy of the Act. The letter of the Act makes it a forbidden practice for an employer to "interfere with" or "restrain" employees in the "right to self-organization." We assume this employer knew the Independent would exercise its power over admission privileges to some extent to protect itself against infiltration of hostile elements. The Board must have known it, too. And both must have known the C.I.O. would, also, if it won. However, the Independent has not indiscriminately excluded all who were against it in the election. The C.I.O. had 83 votes; all but 31 of these voters seem to have been admitted to the Independent, and 12 of those never applied, making 31 apparently rejected. In view of the bitterness and duration of the strike, involving some shooting, it is not strange that good will did not descend on the victors at once. The Board may have expected more moderation when it conducted the consent election and certified the Independent. There is nothing to show that the Company did not too. When it was found how harshly the Independent had behaved, the Company did try persuasion to get the union leaders to relent—the Company's own interests were to get back more of its experienced employees. How it could have done more without breaking both faith and the law, the Court does not point out, and we do not know.

Of course, if the employer in a closed shop is to be responsible for the discriminations or unfairness of the union, he must have a right to be informed about its admissions. If, in collective

bargaining, a union asked a closed shop, the employer would have to demand to know the rules and practices about admission, the fees, the by-laws, the method of electing members. If he should demand this as a condition of collective bargaining, we should expect the Board to hold him guilty of unfair practices, and we have no doubt it would ask this Court to sustain it. Yet here the sole ground of penalizing this employer is that he did not do just that. Should the employer have made the union admit all of its former enemies? If not, by what standard could he allow it to select? Must it also be made to admit even those who would not sign applications or pay initiation fees claimed to be too onerous? The employer is required to reinstate with back pay a dozen who never even asked to join the certified union. But neither the Court nor the Board says what the employer should have required the union to adopt as an admission policy.

The statute expressly permits a closed shop. It can be denied only when the certified union is "established, maintained, or assisted" by unfair labor practices of the employer. But the statute cannot mean that the making and performance of a closed shop contract in itself is an unfair practice which invalidates a closed shop. To so interpret it would be to believe the Congress by this provision was perpetrating a hoax. But if it means that the union can have a closed shop and the employer will supervise its membership, it is a strange contradiction in an Act whose chief purpose was to sterilize the employers and to free workmen of the influence they exerted through control of the right to work.

We can quite understand, and we do not mean to criticize, the motives which animated the Board. We are dealing here with an industry located in a small community where opportunities for other employment are probably not plentiful. It is not unlikely that denial of the right to work for this company will keep these men from earning a livelihood in a place they long have lived. In so far as the Board has been stirred by concern for individual and minority protection against arbitrary union action, we both understand and sympathize with their concern. The employer is the only one it can lay hands on, and the temptation is great to use him to protect minority rights in the labor movement. This and the other cases before us give ground for belief that the labor movement in the United States is passing into a new phase. The struggle of the unions for recognition and rights to bargain, and of workmen for the right to join without interference, seems to

be culminating in a victory for labor forces. We appear now to be entering the phase of struggle to reconcile the rights of individuals and minorities with the power of those who control collective bargaining groups. We have joined in the opinion in *Steele* v. *L. & N. R. Co.*, decided today. That case arose under the Railway Labor Act, which contains no authorization whatever for a closed shop, or the contract forbids the discrimination underlying the adoption of a closed shop, and deals with an industry and a labor group which never has had or sought a closed shop. But here we deal with a minority which the statute has subjected to closed-shop practices. Whether the closed shop with or without the closed union, should or should not be permitted without supervision is in the domain of policy-making, which it is not for this Court to undertake. Neither do we find any authority in the National Labor Relations Board to undertake it.

It happens to be an independent that won here. But counsel for the Board assumes on argument that this is not a one-way policy to require independent unions to admit their enemies. It would, as we understand it, have been applied in the same manner if the C.I.O. had won and had excluded some independent members on suspicion, perhaps, that they were company spies. The obstacle that this decision will interpose to all future bargaining for closed shops is likely to be felt by C.I.O. and A. F. of L. unions many times as often as by independents.

Of course it is the employer who is penalized here, and on shallow and superficial examination it may seem like another victory for labor. The employer must pay many thousands of dollars for hours unworked, because it performed reluctantly but in good faith its closed-shop agreement made under authority of Congress and with knowledge and encouragement of the Board and with the approval and instigation of the C.I.O. union whose members now gain back pay by its repudiation. We think this can not be justified as an unfair labor practice outlawed by Congress. That resistance to closed-shop unions will likely be stiffened if employers must underwrite the fairness of closed-shop unions to applicants and members, and that a good deal labor has fought for may be jeopardized if the price of obtaining it is to leave the union policed by the employer, are considerations beyond our concern. We can only view this as a very unfair construction of the statute to the employer and one not warranted by anything Congress has directed or authorized.